

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED
CLERK'S OFFICE
2004 MAY 26 P 1:34

ZONEPERFECT NUTRITION COMPANY

Plaintiff,

v.

HERSHEY FOODS CORPORATION,
HERSHEY CHOCOLATE &
CONFECTIONERY CORPORATION,
BARRY D. SEARS, and ZONE LABS, INC.,

Defendants.

U.S. DISTRICT COURT
DISTRICT OF MASS.

CIVIL ACTION
NO. 04-10760-REK

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff ZonePerfect Nutrition Company ("ZonePerfect"), by counsel, for its first amended complaint against defendants Hershey Foods Corporation and Hershey Chocolate & Confectionery Corporation (collectively "Hershey"), defendant Barry D. Sears ("Sears"), and defendant Zone Labs, Inc. ("Zone Labs"), and filed by consent, states as follows:

INTRODUCTION

1. ZonePerfect and its predecessor in interest (collectively "ZonePerfect") have been successfully marketing a line of food products and other goods and services in connection with the "ZONE™," "ZONE DIET™," "ZONE PERFECT®," the stylized Zone logo (the "ZONE logo"), and other related registered and common law "ZONE" trademarks (collectively the "ZONE Marks"). Through these efforts, ZonePerfect has become the sole and exclusive holder of rights in the ZONE Marks in connection with the sale of its food products and other related goods and services, including its highly successful ZonePerfect® nutrition bars.

2. In 1996, Sears co-founded and became the first President of ZonePerfect's predecessor, Eicotech Corporation (Eicotech Corporation and ZonePerfect are hereafter collectively referred to as "ZonePerfect"). Sears is the author of several books, including 1995's The Zone, which describes a diet balanced between carbohydrates, proteins and fats, also known as the "Zone Diet." Sears transferred to ZonePerfect all rights to take the dietary and nutritional principles of the Zone Diet, and the "Zone" name and "Zone" logo, found then only on books by Sears, and turn them into a commercially viable line of food products. In his capacity as ZonePerfect's President, Sears was personally involved in ZonePerfect's development and promotion of products sold under the ZONE Marks. Shortly after its inception, ZonePerfect began distributing its ZonePerfect® bars through retail channels. ZonePerfect succeeded in growing the ZonePerfect® line of products and in particular made the ZonePerfect® line of bars into one of the leading nutrition bars in the country. As such, its key asset—the ZONE Marks as used on its products—grew in value as well.

3. By the late 1990s, Sears began to state a desire to be bought out of ZonePerfect to allow him to focus on research and writing. In light of these wishes, it was agreed, when Sears was ultimately bought out of the company in 2001, that ZonePerfect would retain all rights to the ZONE Marks with respect to nutrition bars and other products and services under the ZONE Marks and that Sears would be granted the right to register and use the ZONE Marks solely in connection with the publication of books. Sears and his affiliates were bought out of ZonePerfect for more than \$5 million.

4. Following Sears' buy-out, ZonePerfect's business continued its dramatic growth. By 2003, ZonePerfect had become a significant force in the nutritional foods arena, and had attracted the attention of a number of companies, including Hershey, interested in acquiring the company. In March 2003, Hershey offered over \$125 million to buy ZonePerfect. This offer came only after teams of Hershey representatives were provided

with a virtual blueprint of every aspect of ZonePerfect's business during months of intensive, comprehensive due diligence efforts under a strict confidentiality agreement.

5. After receiving this virtual "how to" operate a successful nutrition bar company, Hershey made and was granted an odd request: to conduct a meeting with Sears himself -- though by then long-since out of the company -- and to have a portion of that meeting outside the presence of any ZonePerfect representative. Following this private meeting, Hershey's interest in acquiring ZonePerfect slacked. In the face of other bidders, Hershey did not submit a higher offer. Instead, it allowed itself to be outbid by Abbott Laboratories later that year.

6. A mere six months after the Abbott deal to acquire ZonePerfect closed, Hershey, Sears, and Sears' current commercial vehicle, Zone Labs announced a plan to "partner" on a new "Zone" bar that will directly undermine ZonePerfect's interest and goodwill in the ZONE Marks. Contrary to the express terms of his agreement with ZonePerfect and in contravention of ZonePerfect's well-established trademark rights, Sears (in connection with and through Zone Labs) has joined with Hershey to market the "SmartZone" bar -- a nutrition bar that uses ZonePerfect's ZONE Marks to compete directly with the ZonePerfect® bar. Hershey has announced that the "SmartZone" bar is slated for launch beginning third quarter, 2004. Sears has publicly endorsed the bar, and stated his intention to allow the front of the packaging of the "SmartZone" bar to prominently feature a "Dr. Sears Zone Approved" seal. *See* Comparison of the ZonePerfect® logo and bar and the proposed Hershey/Sears logo and bar, attached hereto as **Exhibit 1**.

7. Further, the "SmartZone" bar has been touted by both Hershey, Sears, and Zone Labs as the "first" nutrition bar "approved" by Sears -- a statement that is patently false and misleading, given Sears' prior ownership interest in ZonePerfect and his years of work there personally designing and approving ZonePerfect® nutrition bars. Hershey's, Sears',

and Zone Labs' effort to market and distribute the "SmartZone" bar constitutes a bad faith effort to confuse the public and trade off of the goodwill developed and acquired by ZonePerfect, and is likely to cause significant and irreparable consumer confusion regarding ZonePerfect's ZONE Marks.

8. By this action, ZonePerfect seeks to enjoin Hershey, Sears, and Zone Labs from marketing food products and other related goods and services using the ZONE Marks. ZonePerfect also seeks to prevent further damage and irreparable harm, including erosion of its goodwill; to halt Hershey's, Sears', and Zone Labs' false and misleading promotional activities; and to obtain additional relief as set forth below.

PARTIES

9. ZonePerfect is a corporation formed under the laws of Delaware with its principal place of business at 100 Cummings Center, Suite 335N, Beverly, MA 01915. ZonePerfect markets and distributes nutritional products such as bars, shake mixes and prepared meals that follow the principles of the Zone Diet. In 2003, the company grew sales to nearly \$100 million in revenue, largely on the strength of ZonePerfect® nutrition bar sales. ZonePerfect sells its bars through a wide variety of retail outlets including Costco, CVS, 7-Eleven, Wal-Mart and Target.

10. Hershey Foods Corporation is, on information and belief, a corporation formed under the laws of Delaware with its principal place of business in Hershey, Pennsylvania. Hershey is a major North American manufacturer of chocolate and non-chocolate confectionery and retail products.

11. Hershey Chocolate & Confectionery Corporation is a wholly owned corporate subsidiary of Hershey Foods Corporation, formed under the laws of Delaware, with its principal place of business in Hershey, Pennsylvania.

12. Sears is, on information and belief, an individual domiciled in Massachusetts. In 1995, Sears published The Zone. He since has published several books concerning the Zone Diet and related issues. Sears is the former President of ZonePerfect.

13. Zone Labs is, on information and belief, a foreign corporation, formed under the laws of Delaware with its principal place of business in Danvers, Massachusetts. On information and belief, Sears is the president and majority owner of Zone Labs.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338, and 1367.

15. Venue is proper in this district under 28 U.S.C. § 1391.

FACTS

The Zone Diet and ZonePerfect.

16. In 1995, Sears wrote The Zone, which quickly became a New York Times #1 best-selling book. In the book, Sears advocates a diet consisting of 40% carbohydrates from fruits and vegetables, 30% low-fat protein, and 30% healthy monounsaturated fats at every meal (the "Zone Diet").

17. Each copy of The Zone book featured an 800 number for "technical support" and other inquiries. A certain portion of the callers to the 800 number sought food products such as nutrition bars that were compliant with the Zone Diet.

18. In an effort to exploit the 800 number, Sears engaged in an ultimately unsuccessful foray into multi-level marketing of a limited number of food products and supplements. Included among those products was a nutritional bar developed by Sears and manufactured by Pure Distributors, Inc., called the "Biozone" bar.

19. During the time Sears and his associates were selling the Biozone bar through multi-level marketing arrangements, Sears publicly touted and endorsed the bars as “optimal athlete nutrition to lower insulin levels and reduce body fat.” *See Pierre, Colleen, Athletes, Strength Trainers Need Adequate Carbohydrates in Diet*, Tampa Tribune, April 11, 1996, attached hereto as **Exhibit 2**.

20. Only a few months later, after Sears’ abrupt split with Pure Distributors, Inc., Sears had completely reversed his opinion, dismissing the exact same Biozone bars as “nothing more than candy.” *See Seigal, Jessica, Zoned Out*, Los Angeles Magazine, February 1997, attached hereto as **Exhibit 3**.

21. Without a product to sell, in the third quarter of 1996, Sears obtained an infusion of capital and other resources and formed ZonePerfect to facilitate the development and general commercialization of nutrition, health, and cosmetic products based on Zone Diet principles. The creation of ZonePerfect is memorialized in a Stock Purchase and Holders Agreement dated September 19, 1996 (the “1996 Agreement”). *See* 1996 Agreement, attached hereto as **Exhibit 4**. ZonePerfect opened its offices in Marblehead, Massachusetts, adjacent to Sears’ laboratory.

22. In addition to being a major shareholder, Sears became ZonePerfect’s first President and a member of its board of directors. Sears’ brother also became a member of ZonePerfect’s board of directors, and he and Surfactant Technologies, Inc., a company controlled by the Sears brothers, also became significant shareholders in ZonePerfect. Thereafter, Sears worked to develop products for the company and provided his personal endorsement, likeness, and signature to ZonePerfect’s products.

23. Through the 1996 Agreement, Sears transferred to ZonePerfect for consideration, among other things, the exclusive right to manufacture, distribute, market,

sell and exploit those handful of products Sears has been selling through prior multi-level marketing ventures. 1996 Agreement, §§ 1.1(p)(3-5); 3.2.

24. Sears further transferred to ZonePerfect for consideration all rights to certain trademarks, including "Eicozone," "Zone Café," and "Zone Nutrition Center." 1996 Agreement, §§ 1.1(p)(3-5); 3.2.17. Sears also transferred to ZonePerfect for consideration, the sole right to use certain intellectual property owned or controlled by Sears, including certain registered and unregistered "trademarks, tradenames, and service marks" owned or controlled by Sears. 1996 Agreement, § 7.1(e).

25. Through hiring staff, and installation of business infrastructure, ZonePerfect organized and oriented its resources to the development of a nutrition bar to be marketed to the general public through retail outlets.

26. In or about January 1997, ZonePerfect began selling nutrition bars under the brand name "Eicozone." The Eicozone bars were only an interim product to generate revenue through existing multi-level marketing channels and the 800 number during initial organization of the company. The bars themselves were packaged in plain foil and were only sold in boxes of fourteen. These boxes stated that the "EicoZone Meal Replacement Bars are the result of 14 years of research by Dr. Barry Sears as described in the best-selling book The Zone." Sears endorsed the Eicozone bar and authorized this use of his name on its packaging.

Evolution of the ZonePerfect® Mark.

27. In or about February 1997, ZonePerfect management began discussions concerning the re-branding of the company's consumer products. It had been agreed from the beginning of the company that the brand name "Eicozone" sounded too medicinal and was not consumer friendly.

28. After discussions among management and outside consultants, the brand name "ZonePerfect" was selected to replace the Eicozone brand on all consumer products. Thereafter, ZonePerfect retained the services of Bright Designs, Inc. to develop a distinctive logo for the new ZonePerfect® bar.

29. The first ZonePerfect® logo featured the word "Zone" in a distinctive block-letter font (the "ZONE logo") with the word "perfect" in small, thin letters approximately a fifth the size of letters in the ZONE logo and placed along the bottom of the ZONE logo. *See* Copy of the first ZonePerfect® logo, attached hereto as **Exhibit 5**.

30. The ZONE logo used in the ZonePerfect® logo was designed, with Sears' approval, to closely approximate the distinctive font used for the word "ZONE" on the book covers of The Zone and Mastering the Zone in an effort to expressly tie the ZonePerfect® bar to the Zone Diet and Sears' publications. For over six years, the ZONE logo has been a fixture on each of ZonePerfect's products and each of Sears' book covers. *See* Copies of The Zone and selected other Sears' book covers, attached hereto as **Exhibit 6**.

31. In 1997, ZonePerfect began distribution of ZonePerfect® bars in the same three flavors as the Eicozone bar had formally been sold. Each ZonePerfect bar was developed by Sears and had Sears' name printed on the front of the bar above the ZonePerfect® logo.

32. Each ZonePerfect® bar also featured Sears' signed testimonial and endorsement on the side, in which Sears proclaims: "The ZonePerfect™ Nutrition Bar is the easiest way to enter the Zone™. ZonePerfect™ is formulated with a precise ratio of protein, carbohydrate and fat that triggers the burning of stored body fat for the next four to six hours." Likewise, the backs of boxes of twelve contained Sears' likeness and signed testimonial, including his "personal guarantee that the product represents the cutting edge of

Zone™” technology. See Copies of the 1997 ZonePerfect® bar packaging and 12-pack box, attached hereto as **Exhibit 7**.

33. Initially, ZonePerfect sold ZonePerfect® bars only through its existing multi-level marketing channels and via the 800 number, which by then was printed in The Zone, as well as Sears’ follow-up book, including Mastering The Zone (1996) and Zone Food Blocks (1997).

34. In 1997, Sears also published Zone-Perfect Meals in Minutes, a title directly tied to the ZONE PERFECT® mark and products. The cover of both Zone Food Blocks and Zone-Perfect Meals in Minutes utilize the identical ZONE logo as that on ZonePerfect products, including the distinctive block-style font and target “cross-hairs” on the “O” in “Zone.” See Copies of the Zone Food Blocks and Zone-Perfect Meals in Minutes book jackets, attached hereto as **Exhibit 8**.

ZonePerfect Develops into a Commercial Success.

35. Once ZonePerfect established the ZonePerfect® brand in 1997, it began extensive efforts to place ZonePerfect® nutrition bars in retail settings. The company also established a website offering ZonePerfect® products.

36. Throughout 1997 and into 1998, the company hired sales teams and began to establish a network of initially small, local retail outlets that carried the ZonePerfect® bars. These early successes were used to secure larger and larger retail customers.

37. Finally, in or about the fourth quarter 1998, ZonePerfect negotiated a deal with its first major national retailer, CVS Pharmacy, to sell ZonePerfect® bars at CVS Pharmacy locations.

38. In 1998, ZonePerfect launched additional food products under the ZonePerfect® brand, including: prepackaged meals, protein powders, and diet drinks. These

products were also developed by ZonePerfect in cooperation with, and with the endorsement of, Sears.

39. Sears also developed, on behalf of and for the benefit of ZonePerfect, a new type of ZonePerfect® bar called the “crunch bar” or “slab bar” in 1998. The bar came in four flavors: Strawberry Yogurt, Apple Cinnamon, Chocolate Raspberry, and Strawberry Fruit Crunch, the first three of which ZonePerfect still offers today using the same formulas developed by Sears in 1998.

40. The four new ZonePerfect® bars shipped in first quarter 1999.

41. These new bars, as with the then-existing ZonePerfect® bars, featured Sears’ name on the front, and Sears’ testimonial “guarantee” and signature on the side. *See* Copy of the 1999 individual ZonePerfect® bar packaging, attached hereto as **Exhibit 9**.

42. The ZonePerfect® bars were shipped in 12-pack boxes imprinted with Sears’ likeness, signature, and a quote from Sears stating: “I am exceptionally proud of the scientific research and development that went into the patented All Natural ZonePerfect™ Nutrition Bar. You have my personal guarantee that this product represents the cutting edge of Zone™ technology.” *See* Copy of the 1999 ZonePerfect 12-pack box, attached hereto as **Exhibit 10**.

43. The bottom panel of the 12-pack box was imprinted with the same 800 number featured in Sears’ books, the ZonePerfect website address, and a statement that “Zone™ and ZonePerfect™ are trademarks of Eicotech Corporation.”

44. ZonePerfect continued its efforts to broaden its number of retail outlets. Buoyed by positive consumer reaction and increased sales, the company was able to negotiate deals with 7-Eleven and other major retailers to carry the ZonePerfect® bars.

45. Over the course of 1999 and 2000, ZonePerfect continued to grow its business, launching a number of new ZonePerfect® products, including several new

ZonePerfect® bar flavors such as Lemon Yogurt, Chocolate Mint, Chocolate Peanut Butter, Chocolate Fudge Graham, Blueberry Yogurt, and others.

46. In early 2001, the ZonePerfect® logo was redesigned to its current iteration. The current ZonePerfect® logo retains and features the ZONE logo with a scripted "Perfect" placed below and secondary to the ZONE logo. See Copy of the current ZonePerfect® logo, attached hereto as **Exhibit 11**.

47. ZonePerfect owns the ZONE PERFECT® stylized mark for use on and in connection with, among other things, the sale of food, beverage, and nutritional supplement products in the United States, with first use in commerce at least as early as April 2001. On November 5, 2002, the United States Patent and Trademark Office (the "PTO") issued United States Trademark Registration No. 2,645,665 to ZonePerfect for the ZONEPERFECT® stylized mark. See **Exhibit 12**, attached hereto.

48. ZonePerfect owns the ZONE PERFECT® word mark for use on and in connection with, among other things, the sale of food, beverage, and nutritional supplement products in the United States, with first use in commerce at least as early as April 1997. On November 23, 1999, the PTO issued United States Trademark Registration No. 2,294,807 to ZonePerfect for the ZONE PERFECT® word mark. See **Exhibit 13**, attached hereto.

49. ZonePerfect owns the ZONE PERFECT® word mark for use on and in connection with, among other things, the sale of athletic clothing in the United States, with first use in commerce at least as early as October 1996. On August 10, 1999, the PTO issued United States Trademark Registration No. 2,269,790 to ZonePerfect for the ZONE PERFECT® word mark. See **Exhibit 14**, attached hereto.

50. ZonePerfect owns the ZONE PERFECT® word mark for use on and in connection with, among other things, meal delivery services, with first use in commerce at least as early as January 2000. On September 25, 2001, the PTO issued United States

Trademark Registration No. 2,492,467 to ZonePerfect for the ZONE PERFECT® word mark. See **Exhibit 15**, attached hereto.

51. ZonePerfect owns the ZONE PERFECT® word mark for use on and in connection with, among other things, restaurant services and counseling and educational services, with first use in commerce at least as early as January 1998. On November 28, 2000, the PTO issued United States Trademark Registration No. 2,408,977 to ZonePerfect for the ZONE PERFECT® word mark. See **Exhibit 16**, attached hereto.

52. ZonePerfect owns the ZONE UNIVERSITY® word mark for use on and in connection with, among other things, the conducting of classes, seminars, conferences and workshops in the field of diet, nutrition, and health in the United States, with first use at least as early as July 2000 and first use in commerce at least as early as October 2000. On September 11, 2001, the PTO issued United States Trademark Registration No. 2,487,942 to ZonePerfect for the ZONE UNIVERSITY® word mark. See **Exhibit 17**, attached hereto.

53. ZonePerfect owns the ZONE TRAINER® word mark for use on and in connection with, among other things, the conducting of counseling in the field of diet, nutrition, and health in the United States, with first use in commerce at least as early as December 1999. On July 10, 2001, the PTO issued United States Trademark Registration No. 2,466,823 to ZonePerfect for the ZONE TRAINER® word mark. See **Exhibit 18**, attached hereto.

54. ZonePerfect's registration of the above-referenced marks (collectively the "Registered ZONE Marks") is valid and subsisting and constitutes *prima facie* evidence of ZonePerfect's exclusive right to use the Registered ZONE Marks in interstate commerce on the goods and services specified in the registrations.

55. ZonePerfect's products have featured the ZONE Marks, including the Registered ZONE Marks continuously in various forms and styles as ZonePerfect's

trademarks. These products have been sold throughout the United States under the ZONE Marks.

56. The ZONE Marks are famous marks, are inherently strong and distinctive, have long been used by ZonePerfect in connection with the goods with which they appear, have long been the subject of substantial advertising and promotion by ZonePerfect in the United States, and are widely recognized by retailers and consumers.

ZonePerfect's Multi-Million Dollar Buy-out of Sears and His Affiliates.

57. Beginning in the late 1990s, Sears indicated dissatisfaction with the retail orientation of ZonePerfect. He repeatedly stated his desire to get out of the "bar business" and to concentrate instead on scientific research and writing. Sears expressed his fear that his association with a commercially successful retail product would diminish his reputation as a scientist.

58. On October 17, 2001, ZonePerfect and Sears executed a stock repurchase agreement (the "2001 Agreement"), whereby ZonePerfect agreed, *inter alia*, to buy-out Sears' equity interest in the ZonePerfect company, and Sears agreed, *inter alia*, to terminate his employment relationship with ZonePerfect. *See* 2001 Agreement, §6, attached hereto as **Exhibit 19**.

59. As consideration for the 2001 Agreement, ZonePerfect agreed to compensate Sears in the amount of \$2,887,500. ZonePerfect also agreed to compensate Sears' brother, Douglas Sears, in the amount of \$1,537,500, and their company Surfactant Technologies, Inc., in the amount of \$975,000. *See* 2001 Agreement, §3.

60. ZonePerfect paid Sears and his affiliates a total of \$5,400,000 as consideration terms for the 2001 Agreement.

61. The parties' intent, as manifested in the 2001 Agreement, was to provide Sears with the right to continue selling and writing books, and for ZonePerfect to continue

its exclusive commercialization of Zone-related, non-book products. The 2001 Agreement was expressly structured to protect and preserve the goodwill ZonePerfect had developed in the ZONE Marks in connection with food products which ZonePerfect has been marketing with success and, obviously, with the knowledge of Sears.

62. In the agreement, Sears acknowledged ZonePerfect's ownership claims to the composition mark ZONE PERFECT®, and ZonePerfect is confirmed to be the sole owner of marks including "EICOZONE™," "ZONE CAFÉ™," and "ZONE NUTRITION CENTER™." *See* 2001 Agreement, §2(c) (referencing the 1996 Agreement, §§ 1.1(¶10)).

63. The 2001 Agreement made clear that Sears has no ownership rights to use the ZONE Marks on food products. In the Agreement, ZonePerfect granted Sears the right to use the commercial marks "ZONE™" and "ZONE DIET™" and "ZONE PERFECT®" solely in connection with the publication of books. *See* 2001 Agreement, §4(a); 4(c). All other rights developed by ZonePerfect in the ZONE Marks were retained by ZonePerfect.

64. Thus, by executing the 2001 Agreement, Sears understood and expressly agreed that he was without right to use (or approve anyone else to use) ZONE Marks in the sale and distribution of food products.

2002-2003: Putting ZonePerfect on the Market.

65. On the strength of ZonePerfect's brand name and the growing popularity of the ZonePerfect® bar, ZonePerfect saw revenue continue to increase dramatically.

66. By early 2002, ZonePerfect had become one of the nation's top sellers of nutrition bars, growing sales to over \$50 million, largely on the strength of ZonePerfect® bar sales.

67. In late 2002, a number of companies emerged as potential buyers of the ZonePerfect business, including Hershey. ZonePerfect retained the investment banking services of Adams, Harkness & Hill ("AHH") to facilitate a potential sale of the business. AHH generated a collection of extensive confidential and proprietary information regarding multiple aspects of ZonePerfect's business.

68. To obtain a copy of the collected confidential information, Hershey signed an agreement to keep the information it learned from the offer binder or through any further due diligence confidential, and to use that information only in connection with its investigation of acquiring ZonePerfect. See October 7, 2002 Confidentiality Agreement between ZonePerfect and Hershey, attached hereto as **Exhibit 20**.

69. In the Confidentiality Agreement, Hershey acknowledges that it would be "impossible" to measure the damage that a breach of Hershey's confidentiality obligations could do to ZonePerfect. See Confidentiality Agreement, ¶ 5. As such, Hershey confirms ZonePerfect's right to seek an injunction against any such conduct. *Id.*

Hershey Offers to Purchase ZonePerfect.

70. After receiving the confidential materials from AHH providing an overview of ZonePerfect's business, on or about January 14, 2003, Richard Lenny, Chairman, President, and Chief Executive Officer of Hershey submitted a letter to AHH indicating an interest in pursuing possible acquisition of ZonePerfect, but requesting that Hershey first be allowed to

conduct additional due diligence before making a bid. See January 14, 2003 Letter, attached hereto as **Exhibit 21**.

71. In that letter C.E.O. Lenny states that Hershey is "very excited about the prospect of bringing together ZonePerfect's strong name within the functional foods category with Hershey's leadership position across the U.S. confectionery category." (emphasis added).

72. For the rest of January and into February 2003, Hershey conducted extensive due diligence of ZonePerfect, through which Hershey gained access to highly confidential information fundamental to all facets of ZonePerfect's business operations and products. Hershey also had access to the 2001 Agreement between ZonePerfect and Sears and, on information and belief, became fully aware that Sears retained rights to use ZONE Marks solely in connection with books.

73. As part of Hershey's due diligence, ZonePerfect allowed teams of Hershey's representatives to study volumes of company files which contained highly confidential information concerning, *inter alia*:

- a. Branding strategies for, and brand recognition of, the ZONE Marks;
- b. ZonePerfect's financial performance;
- c. ZonePerfect's customer accounts;
- d. Revenue data for each ZonePerfect® product;
- e. ZonePerfect's product pricing, sales, marketing and distribution strategies;
- f. ZonePerfect's accounts receivable and accounts payable;
- g. ZonePerfect's corporate organization and governance;
- h. ZonePerfect's co-manufacturers and suppliers;

- i. Detailed information about the ZonePerfect® bars, including ingredients, product preparation techniques, quality control standards, physical requirements, shelf life, storage procedures, and packaging requirements; and
- j. ZonePerfect contracts, including the 1996 Agreement and the 2001 Agreement concerning Sears.

74. Such highly confidential and proprietary information provided Hershey a complete blueprint to ZonePerfect's business. ZonePerfect's primary assets consisted of its rights to the ZONE Marks and the products it was marketing and planning to market using those marks.

75. On February 21, 2003, Hershey's C.E.O. Lenny submitted a proposal to acquire 100% of ZonePerfect for \$92 million. *See* February 21, 2003 Letter, attached hereto as **Exhibit 22**.

76. Despite the fact that Sears was by then no longer an employee or shareholder of ZonePerfect, among the terms of the potential deal in Hershey's February letter was a section titled "Approvals," which read "Hershey will also require the following to enter into definitive agreement for Transaction: A meeting between Hershey and Dr. Barry Sears which produces results satisfactory to Hershey." Hershey claimed only to want to ensure that Sears would not pose a "threat" to ZonePerfect should Hershey purchase the company.

77. From late February to early March 2003, Hershey conducted continued diligence of ZonePerfect's confidential and private business information, and on March 13, 2003, Hershey's C.E.O. Lenny submitted a second proposal to acquire ZonePerfect in which Hershey raised its offer to \$127 million. *See* March 13, 2003 Letter, attached hereto as **Exhibit 23**.

78. The approval section of the March 13, 2003 letter again requested a meeting between Hershey and Sears producing “satisfactory results” to Hershey, and states in closing, “We continue to remain very enthused about the prospect of bringing together ZonePerfect’s strong name within the nutrition category with Hershey’s leadership position across the U.S. confectionery and snack market.” (emphasis added)

79. After submitting its March bid, Hershey continued to press for a meeting with Sears, in spite of his complete lack of any involvement with the company by that time.

80. In light of these repeated requests, ZonePerfect arranged for an April 1, 2003 lunch meeting at Radius Restaurant in Boston between Sears and his representatives and representatives of Hershey, including its CEO Lenny, and Vice President for Strategy and Innovation Dennis Eshleman (the “Radius Lunch”). While ZonePerfect’s CEO and representatives of its major investors were present for the first part of the meeting, they had been asked in advance by Hershey to excuse themselves midway through the lunch, and did so as requested. Hershey and Sears then held a private meeting.

81. Subsequent to the Radius Lunch, Hershey’s interest in acquiring ZonePerfect flagged. Hershey did not submit another bid for ZonePerfect, and ultimately allowed itself to be outbid by Abbott Laboratories.

82. Abbott Laboratories completed its purchase of ZonePerfect in August 2003.

83. ZonePerfect’s sales have continued to climb, reaching nearly \$100 million in 2003.

Hershey Announces its “SmartZone” Bar

84. A mere six months after the Abbott deal was completed, Hershey, Sears, and Zone Labs announced that they had entered into a “partnership” to develop and market the “SmartZone” bar. The “SmartZone” bar will compete directly with the ZonePerfect® nutritional bar.

85. A February 9, 2004 marketing and advertising announcement (the "February 9, 2004 Advertisement") published by Hershey, states in part:

Hershey Foods Corporation and Dr. Barry Sears today announced plans to introduce the first-ever nutrition bars with the science-based nutritional benefits of the Zone Diet and the great taste consumers expect from Hershey. The products will be the first to carry the "Dr. Sears Zone Approval" seal and will be introduced during the third quarter.

"Our new partnership with Dr. Sears is an outstanding match of Hershey's strong brand-building and business-system capabilities with his world-renowned dietary expertise," said Richard H. Lenny, Chairman, President and Chief Executive Officer, Hershey Foods Corporation. "Together, we'll create innovative new products that deliver the superior nutritional benefits of his Zone Diet and the great taste consumers expect from Hershey. This is an exciting opportunity for us as we further expand our presence in the nutrition snack segment and work with Dr. Sears to meet the growing consumer demand for sound nutrition, convenience and a healthy lifestyle."

See February 9, 2004 Advertisement, attached hereto as **Exhibit 24**.

86. In addition to using the ZONE mark in its bar's name, Hershey has stated its intent to feature a "Dr. Sears Zone Approved" seal on each "SmartZone" bar. This "seal" consists primarily of a large "Zone" logo almost identical to the ZONE logo ZonePerfect has used on its ZonePerfect® bars and other products for over six years. *See* Copy of the "SmartZone" bar's packaging with its "Zone Approval seal," attached hereto as **Exhibit 25**.

87. The statement that the "SmartZone" bar is the "first" nutrition bar "approved" by Sears is patently false and misleading. For many years, all of ZonePerfect's bars were developed for ZonePerfect by Sears and carried his personal endorsement.

88. The February 9, 2004 Advertisement, including these false and misleading statements, has been widely reported upon by such media outlets as CBS Marketwatch, Forbes.com, and others. *See* Sampling of published reports concerning February 9, 2004 Advertisement, attached as **Exhibit 26**.